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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUCY LEE GASTELLO,

Defendant and Appellant.

D037624

(Super. Ct. No. SCD152956)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed.

Lucy Lee Gastello entered a negotiated guilty plea to grand theft by an employee. (Pen. Code, § 487, subd. (b)(3).) The court sentenced her to prison for the two-year middle term to run concurrent with the term in San Diego County Superior Court case

No. SCD155021.<sup>1</sup> After holding a restitution hearing, the court ordered Gastello to pay \$33,357.75. Gastello contends the court erred in determining the amount of restitution.

### FACTS

While Gastello was employed as a bookkeeper, her duties included receiving incoming bills, issuing checks through the computer for bills the owner found payable, inputting invoices, making bank deposits and reconciling bank statements. She was not authorized to write or sign checks on her own. Nevertheless, she wrote herself checks totaling \$29,600. She also kept for herself \$757.75 in cash belonging to her employer. There was thus a substantiated loss of \$30,357.75. An insurer reimbursed Gastello's employer \$27,000. Additionally, the employer believed approximately \$30,000 was missing from receipts of a trade show at which Gastello collected the checks, cash and credit card slips.

### DISCUSSION

Penal Code section 1203.4 provides in pertinent part, "restitution for value of stolen property . . . shall be the replacement cost of like property." A defendant who contests the amount of restitution sought has the burden of proving that the amount sought exceeds the replacement cost. (*People v. Hartley* (1984) 163 Cal.App.3d 126, 130.) A trial court does not abuse its discretion in setting restitution if there is a factual

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<sup>1</sup> In case No. SCD155021, Gastello was convicted of fraudulent appropriation by an employee. The owner of the business where Gastello was employed reported Gastello took \$23,267.85 through checks written to herself and electronic transfers while employed as a bookkeeper.

and rational basis for the amount set. (*People v. Walmsley* (1985) 168 Cal.App.3d636, 639.)

Gastello argues the amount of restitution the court found payable is unreasonable because the loss from the trade show is a speculative estimate. We disagree. In *People v. Ortiz* (1997) 53 Cal.App.4th 791, the defendant was convicted of possessing counterfeit cassette tapes. The court ordered her to pay the nonprofit trade association \$2,000 for estimated economic loss. While affirming, the reviewing court noted that crime victims have a constitutional and statutory right to full restitution for losses. The reviewing court said:

"From the foregoing constitutional and statutory provisions we perceive two essential requirements for awarding restitution: (1) the victim must have suffered a loss 'as a result of the commission of a crime'; and (2) the amount of the loss must be 'determined' by the court. [¶] . . . [¶]

"We interpret the requirement the amount of loss be 'determined' by the court to mean the court must decide the amount of the loss on grounds which will withstand review for abuse of discretion. We base our interpretation of the statute on the well-established rule '. . . the trial court is vested with broad discretion in setting the amount of restitution [and] it may "'use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole.'" . . .' [Citation.] Thus, while the amount of restitution cannot be arbitrary or capricious, '[t]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. . . .' [Citation.]

"We conclude the trial court's restitution award of \$2,000, based on the estimated sale of 2,000 counterfeit tapes, was rationally based. From the fact the police found \$1,150 hidden in Ortiz's dresser drawer and the fact Ortiz was selling the tapes for 75 to 80 cents each, the court could reasonably conclude the \$1,150 represented the sale of approximately 1,500 tapes. Ortiz also possessed material for labeling and packaging the counterfeit tapes which the court could reasonably infer was purchased with the proceeds from selling another 500 tapes. Setting the amount of loss to the ALARM members at \$1 per tape was a very conservative calculation which benefited Ortiz because Richardson testified a genuine cassette tape could not be produced for \$1." (*People v. Ortiz, supra*, 53 Cal.App.4th at pp. 799-800.)

Here, the company based its estimate of the loss from the trade show on a comparison of the revenue of two prior shows, the fact that customers often paid with cash, the fact the company president saw customers make purchases, an increase in the number of persons who attended the recent show compared with two prior shows and deposit slips from the recent trade show that did not match those expected. Additionally, Gastello told a detective that she was responsible for a loss of around \$75,000.<sup>2</sup> This evidence supports the court's finding that the employer lost \$33,357.75 (\$3,357.75 unreimbursed substantiated loss and a \$30,000 loss at the trade show). The trial court did not err in ordering Gastello to pay \$33,357.75 in restitution.

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<sup>2</sup> A tape recording of the conversation between Gastello and the detective was heard by the court and received into evidence.

DISPOSITION

The judgment is affirmed.

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KREMER, P. J.

WE CONCUR:

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HUFFMAN, J.

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O'ROURKE, J.